Supreme Court, U.S.
FILED
AUG 15 2016
OFFICE OF THE CLERK

No. 15-5991

In the Supreme Court of the United States

LAWRENCE EUGENE SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a bank-fraud offense under 18 U.S.C. 1344(1) requires proof that the defendant intended to deceive and cheat the defrauded bank and expose the bank to a financial loss or a risk of loss.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 1
Summary of argument 8
Argument:
Section 1344(1) is not limited to schemes targeting property owned by the bank and does not require intent to cause the bank harm 12
A. The bank-fraud statute comprehensively protects banks from deceptive schemes to obtain money or property owned by banks or held by banks on behalf of their customers 13
B. Bank deposits are a "property" interest that Section 1344(1) protects from fraudulent schemes 16
1. Section 1344(1)'s prohibition against a "scheme to defraud" a bank protects against deprivation of a broad spectrum of property interests, including both ownership and possessory interests 17
2. Section 1344's structure does not limit Section 1344(1)'s protections only to bank ownership interests in property 23
3. Section 1344's legislative history does not support petitioner's bank-owned property theory 25
4. No sound reason exists for basing criminal liability on a defendant's subjective belief about whether the bank itself owns the property targeted by a fraudulent scheme 30
5. Petitioner's bank-owned property theory is a particularly anomalous one to apply in the banking context 32

Table of Contents—Continued: Page

C. Section 1344(1) requires proof of an intent to deceive a bank, not to cause it monetary loss 36
1. Section 1344(1)'s text and drafting history are incompatible with an intent-to-harm-the-bank requirement 37
2. An intent-to-harm-the-bank requirement is unsound 42
D. Petitioner's remaining challenges to the jury instructions lack merit 45
Conclusion 47
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alamo Land & Cattle Co. v. *Arizona*, 424 U.S. 295 (1976) 20
Allison Engine Co. v. *United States ex rel. Sanders*, 533 U.S. 662 (2008) 17
Almota Famers Elevator & Warehouse Co. v. *United States*, 409 U.S. 470 (1973) 23
Bank of Marin v. *England*, 385 U.S. 99 (1966) 33
Bank of the Republic v. *Millard*, 77 U.S. (10 Wall.) 152 (1870) 34
Bell v. *Burson*, 402 U.S. 535 (1971) 20
Bell v. *United States*, 462 U.S. 356 (1983) 26
Bridge v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) 13
Burton v. *United States*, 196 U.S. 283 (1905) 33
Callanan v. *United States*, 364 U.S. 587 (1961) 36
Carpenter v. *United States*, 484 U.S. 19 (1987) 19, 20, 40
Cleveland v. *United States*, 531 U.S. 12 (2000) 20, 22, 29

Cases—Continued: Page

Crocker-Citizens Nat'l Bank v. *Control Metals Corp.*, 566 F.2d 631 (9th Cir. 1977) 33
Dean Witter Reynolds, Inc. v. *Variable Annuity Life Ins. Co.*, 373 F.3d 1100 (10th Cir. 2004) 33
Durland v. *United States*, 161 U.S. 306 (1896) 18
Fuentes v. *Shevin*, 407 U.S. 67 (1972) 22
Hammerschmidt v. *United States*, 265 U.S. 182 (1924) 18, 19
Husky Int'l Elecs., Inc. v. *Ritz*, 136 S. Ct. 1581 (2016) 37
J. Walter Thompson, U.S.A., Inc. v. *First Bank-Americano*, 518 F.3d 128 (2d Cir. 2008) 43
Jensen v. *State Bank of Allison*, 518 F.2d 1 (8th Cir. 1975) 33
Johnson v. *United States*, 529 U.S. 694 (2000) 36
Kawashima v. *Holder*, 132 S. Ct. 1166 (2012) 46
Kruger v. *Wells Fargo Bank*, 521 P.2d 441 (Cal. 1974) 33
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) ..... *passim*
Lynch v. *Alworth-Stephens Co.*, 267 U.S. 364 (1925) 20
Marine Bank v. *Fulton Bank*, 69 U.S. (2 Wall.) 252 (1865) 32, 34
McNally v. *United States*, 483 U.S. 350 (1987) 9, 18, 19, 25
Muscarello v. *United States*, 524 U.S. 125 (1998) 36
Neder v. *United States*, 527 U.S. 1 (1999) 13, 17, 18, 25, 37, 39
Ocasio v. *United States*, 136 S. Ct. 1423 (2016) 38
Pasquantino v. *United States*, 544 U.S. 349 (2005) 17, 19
Phoenix Bank v. *Risley*, 111 U.S. 125 (1884) 33, 34
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 9, 19, 20

Cases—Continued: Page

Sanders v. *City of San Diego*, 93 F.3d 1423 (9th Cir. 1996) 22
Scammon v. *Kimball*, 92 U.S. 362 (1876) 34
Sekhar v. *United States*, 133 S. Ct. 2720 (2013) 20, 21
Skilling v. *United States*, 561 U.S. 358 (2010) 18
Smith v. *United States*, 508 U.S. 223 (1993) 36
Soldal v. *Cook Cnty.*, 506 U.S. 56 (1992) 23
Tanner v. *United States*, 483 U.S. 107 (1987) 17
United States v. *Cohn*, 270 U.S. 339 (1926) 18
United States v. *Jacobsen*, 466 U.S. 109 (1984) 23
United States v. *Joyce*, 499 F.2d 9 (7th Cir.), cert. denied, 419 U.S. 1031 (1974) 38
United States v. *Kenrick*, 221 F.3d 19 (1st Cir.), cert. denied, 531 U.S. 961, and 531 U.S. 1042 (2000), abrogated in part on other grounds by *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014) 40
United States v. *Maze*, 414 U.S. 395 (1974) 26, 27
United States v. *Nkansah*, 699 F.3d 743 (2d Cir. 2012) 31, 43, 44
United States v. *Park*, 421 U.S. 658 (1975) 46
United States v. *Stavroulakis*, 952 F.2d 686 (2d Cir.), cert. denied, 504 U.S. 926 (1992) 29
Williams v. *United States*, 458 U.S. 279 (1982) 14, 26

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. IV 22
Amend. V 22, 23
Due Process Clause 10
Just Compensation Clause 10, 23
Amend. XIV 22

Statutes, regulations and rules—Continued: Page

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147 42
Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.* 28
15 U.S.C. 1693g(a) 28, 29
15 U.S.C. 1693g(d) 29
Hobbs Act, 18 U.S.C. 1951 20
18 U.S.C. 1014 26
18 U.S.C. 1341 ..... 17, 26, 2a
18 U.S.C. 1343 ..... 17, 3a
18 U.S.C. 1344 (1988) 41
18 U.S.C. 1344 ..... *passim*, 4a
18 U.S.C. 1344(1) ..... *passim*, 4a
18 U.S.C. 1344(2) ..... *passim*, 4a
18 U.S.C. 1346 18
18 U.S.C. 2113(b) 26
12 C.F.R.:
Pt. 205 (2007) 28
Pt. 1005 28
Section 1005.2(a) 28
Section 1005.2(m) 29
Section 1005.6(a) 28
Section 1005.6(b)(1) 28
Section 1005.6(b)(2) 28
Section 1005.6(b)(3) 28, 29
Section 1005.6(b)(6) 29
Supp. I, at 226 29
NACHA Operating R. (2016):
§ 2.12.1 28
§ 3.13.1(b) 28

Rules—Continued: Page

§ 6.1.6 (2007) 28
§ 8.7.1 (2007) 28
§ 8.37(b) 28
§ 8.41 28
§ 8.66 28
§ 8.83 28
§ 8.101 28
App. Pt. 4.2 28

Miscellaneous:

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(4th ed. 1951) 19
(10th ed. 2014) 20
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2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* (3d ed. 2016) 43
130 Cong. Rec. (1984):
p. 1587 41
pp. 1636-1637 41
p. 21,492 42

Miscellaneous—Continued: Page

pp. 21,492-21,493 42
pp. 26,727-26,728 42
pp. 26,780-26,781 42
pp. 26,834-26,838 42
Financial Bribery and Fraud: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984) 41
H.R. 5405, 98th Cong., 2d Sess. (1984) 41
H.R. 5872, 98th Cong., 2d Sess. (1984) 41
H.R. 5963, 98th Cong., 2d Sess. (1984) 42
H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. (1984) 42
H.R. J. Res. 648, 98th Cong., 2d Sess. (1984) 42
H.R. Rep. No. 901, 98th Cong., 2d Sess. (1984) 42
W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 38, 39, 40
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Michie on Banks and Banking, ch. 9:
Vol. 5A (2014):
§ 1 ..... 32, 33
§ 38 ..... 33, 34
Vol. 5C (2015):
§ 328 ..... 32, 33, 34, 35
§ 334 ..... 33, 35
2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2009) 47
Restatement (Second) of Torts (1976) 39
S. 1762, 98th Cong., 2d Sess. (1984) 41
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) ..... *passim*

Miscellaneous—Continued: Page

Joseph Story:
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OPINION BELOW

The opinion of the court of appeals (J.A. 40-55) is reported at 781 F.3d 1130.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2015. A petition for rehearing was denied on June 8, 2015 (J.A. 56). The petition for a writ of certiorari was filed on September 4, 2015, and was granted on April 25, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 14 counts of bank fraud, in violation

of 18 U.S.C. 1344(1). J.A. 27. The district court sentenced petitioner to 57 months of imprisonment, to be followed by five years of supervised release. J.A. 27-28. The court of appeals affirmed. J.A. 40-55.

1. Petitioner's counts of conviction stem from a series of actions that petitioner took in 2007 to execute a fraudulent scheme to obtain money from Bank of America (BoA) by executing bank transfers from a BoA checking account held by Stanley Hsu. J.A. 44-46; see Gov't Ex. 1. Hsu is a Taiwanese-born businessman who obtained United States citizenship after moving to the United States in 1982. C.A. E.R. 322-323. Sometime around 1996, Hsu opened his BoA account while living in California. *Id.* at 323. Soon thereafter, Hsu moved back to Taiwan and arranged to have his BoA statements mailed to his eldest son in California. *Id.* at 324. When that son later moved to Taiwan, however, Hsu arranged, on the suggestion of a work colleague, to have his BoA statements mailed to the colleague's daughter (Beatrice Fu), who lived in California, and who was supposed to forward Hsu's mail to him in Taiwan. *Id.* at 325-326, 343-344, 580-581, 584.

Petitioner—who was Fu's live-in boyfriend at the time—worked from their home and collected the mail as it arrived. C.A. E.R. 581-582, 584-585. Petitioner intercepted Hsu's BoA statements from the mail, and he used Hsu's personal information from them to gain access to Hsu's BoA account. J.A. 44. Petitioner then executed a scheme to obtain money through a series of fraudulent banking transactions: Petitioner used Hsu's personal information to transfer funds from a BoA account held by Hsu to a PayPal account that petitioner opened in Hsu's name; transferred funds from

that PayPal account to two bank accounts at Washington Mutual Bank (WaMu) that petitioner opened in his father's name; transferred funds from those WaMu accounts to a third WaMu account that petitioner opened in his father's name; and used the third WaMu account to write checks to himself and pay for his expenses. J.A. 44-46.

From June 4 to October 15, 2007, petitioner successfully executed 39 separate online electronic fund transactions that collectively transferred $307,047 from Hsu's BoA interest-bearing checking account to PayPal. Gov't Ex. 1, at 4-5, 8, 11, 13-14, 17 (BoA "Interest Checking Account" statements); Gov't Ex. 8 (PayPal transaction log); see J.A. 46. During that same period, petitioner executed numerous other banking transactions that moved the funds from PayPal through the WaMu accounts in his father's name. Gov't Ex. 8; Gov't Ex. 20, at 1-8, 13 (WaMu online interest-bearing savings account statements showing deposits from PayPal and transfers to WaMu account ending 8858); Gov't Ex. 21, at 1-4 (WaMu checking account statement showing same types of deposits and transfers); Gov't Ex. 22, at 2-12 (statement for WaMu account ending 8858 showing deposits and payments on 40 checks from the account). By October 17, 2007, the PayPal account held only $24,667 of the $307,047 that had been transferred from BoA. Gov't Ex. 8, at 1.

In October 2007, Hsu and his son discovered the fraudulent electronic fund transfers from Hsu's BoA checking account, reported the fraud to BoA, closed the compromised account, and opened a new BoA checking account with a new account number. J.A. 46; Gov't Ex. 1, at 16-17; Gov't. Ex. 98 (new account statement); see C.A. E.R. 326-327, 341. BoA then re-

versed 16 of the unauthorized electronic fund transfers that collectively withdrew $132,503 from Hsu's checking account between August 27, 2007, and Hsu's October 2007 report of the fraud, pursuant to a standard banking practice that gave BoA a 60-day window within which to reverse such unauthorized transfers processed through the industry's Automated Clearing House (ACH) network. C.A. E.R. 387-389, 393, 432, 451-452; Gov't Ex. 98, at 2; see Gov't Ex. 8, at 1; J.A. 46; see also pp. 27-28 & n.5, *infra* (discussing this practice). PayPal was thus required to reimburse BoA for the reversed transfers that BoA credited back to Hsu's account. J.A. 46; see C.A. E.R. 388-389.

As a result, BoA ultimately suffered no monetary loss from petitioner's scheme. C.A. E.R. 615. PayPal suffered a net $107,836 loss, reflecting its $132,503 reimbursement to BoA for transfers executed on or after August 27, 2007, less the $24,667 remaining in the scheme's PayPal account. See J.A. 31; cf. Gov't Ex. 8, at 1; Gov't Ex. 98, at 2. Hsu, in turn, suffered a net $174,544 reduction in his BoA account balance, which reflects the remaining unauthorized transfers that BoA did not reverse or otherwise credit back to his account. See J.A. 31.

2. A federal grand jury indicted petitioner on 17 counts of bank fraud, in violation of 18 U.S.C. 1344(1). J.A. 12-16. Section 1344 defines bank fraud as "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—

> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution,

> by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. Because the indictment charged petitioner with violating Section 1344(1), J.A. 12, this case concerns whether petitioner knowingly executed, or attempted to execute, a scheme or artifice "to defraud a financial institution." 18 U.S.C. 1344(1).

At trial, petitioner admitted through counsel in opening and closing arguments that he was "involved in th[e] scheme" and had engaged in a "remarkable course of deception." C.A. E.R. 315, 706; see *id.* at 709. Petitioner, however, argued that the "scheme was not about the banks" and his execution of the scheme was "not bank fraud" because Hsu, not a bank, was the scheme's "intended victim" and the scheme's "one goal, and only one goal, * * * was to get Stanley Hsu's money." *Id.* at 315.

Petitioner requested that the district court instruct the jury that a "scheme to defraud" a financial institution under Section 1344(1) means "a scheme designed to victimize [a bank] by causing [the bank], not only Stanley Hsu, monetary loss." J.A. 25; see J.A. 22, 23. Petitioner similarly requested an instruction that Section 1344(1) requires the specific "intent to defraud" a bank, which, he argued, means "intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss." J.A. 24; see J.A. 22, 23.

Petitioner conceded that circumstantial evidence in the case was sufficient to allow the jury to infer that petitioner "intended to cause the bank harm" and that the government could "argue * * * from the evidence" that petitioner intended "to victimize the institution" because petitioner would have had some "idea

that Mr. Hsu would not be left * * * shouldering the entirety of the loss." C.A. E.R. 647. Petitioner thus argued that his "problem [was] with [a jury] instruction" that failed to require "pro[of] that the bank [wa]s * * * an intended victim of the fraud," because, without such an instruction, the jury could convict petitioner even if it concluded that "[petitioner] never thought that the bank would pay any money out to reimburse Mr. Hsu." *Id.* at 646-647.

The district court rejected petitioner's proposed instructions to require proof of petitioner's "intent to expose [a bank] to a loss or risk of loss." C.A. E.R. 639, 650. The court instead instructed the jury that, to establish bank fraud under Section 1344(1), the government must prove beyond a reasonable doubt that, as relevant here, petitioner "knowingly executed a scheme to defraud a financial institution as to a material matter" with "intent to defraud the financial institution." J.A. 17. A "scheme to defraud," the court explained, is a deliberate plan of action or course of conduct by which "someone intends to deceive, cheat, or deprive a financial institution of something of value." J.A. 18. A "material matter," in turn, is one that has a natural tendency to influence or is capable of influencing a bank to "part with money or property." *Ibid.* Finally, an "intent to defraud," the court instructed, "is an intent to deceive or cheat." J.A. 19. The court added that Section 1344(1) does not require "pro[of] that any financial institution lost any money or property as a result of the scheme to defraud." J.A. 18.

The jury found petitioner guilty on 14 bank-fraud counts. J.A. 27.

3. The court of appeals affirmed. J.A. 40-55. The court held that "[t]he district court correctly refused [petitioner's proposed jury] instructions," J.A. 55, which would have required a jury finding that petitioner "intended the bank * * * to suffer an actual loss or risk of loss as the financial victim of the fraud," J.A. 47. The court of appeals agreed that "an instruction" requiring the jury to find that petitioner "intended the bank to bear the loss" of his scheme, J.A. 43, is inconsistent with the requirements for criminal liability under Section 1344(1). J.A. 51-55.

The court of appeals reasoned that Section 1344's text provides no support for petitioner's argument that Section 1344(1) differs from Section 1344(2) with respect to "the intended financial victim of the fraud, i.e., the intended bearer of the loss." J.A. 51. Neither provision, the court explained, "refers to monetary loss or to the risk of such loss." *Ibid.* Instead, Section 1344(1)'s text "focuses on the intended victim of the deception" (a bank) and, for that reason, it applies to schemes "to deceive the bank" and "covers schemes to deceive the bank directly." *Ibid.* The court accordingly held that Section 1344(1) does not "require[] the government to establish the defendant intended the bank to suffer a financial loss." *Ibid.*

The court of appeals explained that *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014), which held that Section 1344(2) does not require proof that the defendant's fraudulent scheme "created a risk of financial loss to the bank," *id.* at 2395 n.9, reinforced the conclusion that neither Section 1344(1) nor Section 1344(2) turns on "which entity the defendant intended to bear the financial loss" of his scheme. J.A. 53-54. *Loughrin*, the court explained, determined that Sec-

tion 1344(2) was designed to avoid "entangling courts in technical issues of banking law about whether the [bank], or, alternatively, a depositor would suffer the loss from a successful fraud." J.A. 54 (quoting *Loughrin*, 134 S. Ct. at 2395 n.9). "There is no reason to believe Congress wanted courts to become more entangled in such technical issues under [Section 1344(1)] than under [Section 1344(2)]." *Ibid.*

The court of appeals noted that some courts of appeals had previously held that Section 1344(1) requires proof of a "risk of financial loss to the bank," and that those courts had based their holdings on a passage in Section 1344's legislative history reflecting Congress's strong interest in "'protecting the financial integrity'" of banks. J.A. 54 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 377 (1983)). But the court concluded that requiring proof of intent to expose a bank to loss "does not serve" to protect banks' financial integrity: "Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss," and the identity of the person ultimately bearing that risk depends upon "the operation of banking laws," not the identity of the person "that the defendant intends to harm." J.A. 55. The court accordingly refused to "read an additional element into [Section] 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly rejected petitioner's challenge to his bank-fraud conviction under Section 1344(1). Petitioner argues (Br. 9, 11, 15-33) in his merits brief that Section 1344(1) applies only if the

defendant specifically intended to obtain property *owned* by a bank. That argument is different than the argument that petitioner advanced in his proposed jury instructions and in his certiorari petition, namely, that the defendant must "intend[] to expose the bank to actual or potential loss," Pet. 23 (emphasis omitted); see J.A. 22-25. Both of petitioner's contentions are incorrect. Section 1344(1) prohibits the knowing execution of a scheme to defraud a bank of a property interest by deceiving the bank, but it is not limited only to those defendants who intend to deprive the bank of an ownership interest in property or to expose the bank to a monetary loss or risk of loss.

1. Like the mail- and wire-fraud provisions on which it was modeled, Section 1344(1) addresses schemes that would deprive victims of "property" rights. Although petitioner assumes that such "property" interests narrowly include only ownership interests, the concept of "property" in this context had long been "interpreted broadly." *McNally* v. *United States*, 483 U.S. 350, 356 (1987). The term "property" is commonly understood to include "anything of material value *owned or possessed*." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338 (1979) (emphasis added). A fraudulent deprivation of property rights in this context thus "signif[ies] the deprivation of something of value." *McNally*, 483 U.S. at 358 (citation omitted). Indeed, this Court's decisions apply the mail- and wire-fraud prohibitions well beyond the protection of only ownership interests in property.

Section 1344(1)'s protection of non-ownership possessory interests reflects the normally broad understanding of "property." A lessee's possessory interest in land and a bailee's possessory interest in an item

that it holds for a bailor both reflect types of "property" interests recognized in the law. This Court has similarly deemed non-ownership possessory interests to be "property" under the Due Process Clause, "property" protected against unreasonable seizure, and "property" protected under the Just Compensation Clause. No sound reason exists for a different result here.

Petitioner argues (Br. 30-33) that Section 1344(2)'s focus on property "owned by, or under the custody or control of, a financial institution" indicates that Congress took a more limited approach to Section 1344(1). But nothing in Section 1344(2) suggests that Congress intended Section 1344(1) to apply only to property owned by a bank. Indeed, Congress's decision to model Section 1344(1) on the mail- and wire-fraud statutes evinces an intention to give Section 1344(1) the same broad protection for property interests.

Petitioner's reliance (Br. 34-40) on legislative history is equally misplaced. Although Congress enacted Section 1344(1) in part to protect the financial integrity of banks, petitioner's bank-owned property limitation would not sensibly advance that interest. The financial impact of a fraudulent scheme on a bank normally turns on the operation of banking laws and practices governing who will bear the loss, not on whether a defendant targeted property owned by the bank. And to the extent that petitioner argues that Congress intended only to prohibit schemes in which the defendant *believes* (rightly or wrongly) that a bank holds an ownership interest in the money he targets, petitioner's position does not rationally advance an interest in protecting the financial integrity

of banks or distinguish between criminal and non-criminal intent.

Petitioner's bank-owned property theory is particular anomalous in this context. A bank customer's deposit of funds gives ownership of those funds to the bank, which then owes a debt to the customer. The bank may then lend the funds deposited, and it repays its debt to the customer on the customer's demand, often paying interest on deposited funds. Petitioner's recognition (Br. 13, 42-43) that loan-fraud and check-kiting schemes are covered by Section 1344(1) illustrates that his position rests on a fundamental misunderstanding of the banking system. Such schemes, like schemes targeting customer deposits, target the same source of bank-owned money.

2. To the extent petitioner continues to argue that Section 1344(1) requires proof of "inten[t] to expose the bank to actual or potential loss," Pet. 23 (emphasis omitted), that contention lacks merit.

A scheme to "defraud" under Section 1344(1), like its mail- and wire-fraud counterparts, draws meaning from the common law. The requisite culpable intent at common law, however, was merely an intent to deceive, not to harm. And Congress specifically considered and rejected statutory text that would have required an intent to cause a bank economic loss. Congress ultimately adopted text for Section 1344(1) modeled on the mail- and wire-fraud statutes, which Congress understood to include no such requirement.

Finally, an intent-to-harm-the-bank requirement is unsound and serves no evident legislative goal. That requirement suffers from the same basic defects as petitioner's intent-to-target-bank-owned-property requirement. The rules governing allocation of loss

from a banking transaction are complex and vary depending on the type of transaction at issue. A layperson's (likely non-existent) beliefs about how such rules will apply not only will normally have little or no connection to a bank's actual risk of loss, they also fail to distinguish between culpable and non-culpable intent. In short, no sound reason exists for Congress to have wanted bank-fraud liability to turn on a schemer's subjective beliefs on such issues.

ARGUMENT

SECTION 1344(1) IS NOT LIMITED TO SCHEMES TARGETING PROPERTY OWNED BY THE BANK AND DOES NOT REQUIRE INTENT TO CAUSE THE BANK HARM

Petitioner argues (Br. 9-13, 15-33) that Section 1344(1) is limited to bank-fraud schemes in which "the defendant's objective" is "to obtain a bank's *own* property by deceiving that bank." Br. 9. In petitioner's view, Section 1344(1) thus applies only to schemes intended to obtain "bank-*owned* property" but does not apply if the scheme seeks to "obtain non-bank property in the custody and control of the bank, such as bank-customer money." Br. 9, 11-12. That argument shifts petitioner's position from the jury instructions he requested, J.A. 22-25, and from the claim he advanced in seeking certiorari, namely, that Section 1344(1) requires proof that "the defendant *intended* to expose the bank to *actual or potential loss*." Pet. 23 (second emphasis added); see Pet. 13, 20; Pet. Reply Br. 1, 3, 5 (discussing circuit split on whether Section 1344(1) requires "proof of intent to harm a bank"); see also J.A. 50-51. Neither position is correct: Section 1344(1) covers fraudulent schemes designed to obtain money or other property in a bank's custody or control, even if that property is not owned by the bank

and even if the schemer does not intend to "expose" the bank to "monetary loss," J.A. 22-25.

A. The Bank-Fraud Statute Comprehensively Protects Banks From Deceptive Schemes To Obtain Money Or Property Owned By Banks Or Held By Banks On Behalf Of Their Customers

1. Section 1344 makes it a criminal offense "knowingly [to] execute[], or [to] attempt[] to execute, a scheme or artifice" that satisfies either of two descriptions. 18 U.S.C. 1344. In separate clauses, Section 1344 prohibits a scheme or artifice: (1) "to defraud a financial institution," or (2) to obtain money or other "property owned by, or under the custody or control of, a financial institution" by means of "false or fraudulent pretenses, representations, or promises." *Ibid.* Those two clauses set forth complementary prohibitions that Congress designed to "reach a wide range of fraudulent activity." S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983) (*Senate Report*). The section was intended to remedy gaps in prior law in order to serve the "strong Federal interest in protecting the financial integrity of" banks against "those who [would] victimize these banks through fraudulent schemes." *Id.* at 377.

Section 1344's text reflects the broad scope of its coverage. The statute's focus on a "scheme or artifice" reflects that the "gravamen of the offense is the scheme," *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008), "rather than [a] completed fraud," *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (construing Section 1344). Concepts such as "reliance and damage" that are integral to a common-law action for fraud therefore "have no place" in a Section 1344 prosecution. *Id.* at 24-25. Instead, the prohibition

falls on anyone who "knowingly executes, or attempts to execute," the prohibited schemes. 18 U.S.C. 1344.

The two clauses of Section 1344 have distinct but overlapping functions. Section 1344(1) covers any "scheme * * * to defraud a financial institution," which reaches a deceptive scheme designed to deprive the bank of property, even if it does "not involve * * * false representations." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 n.4 (2014) (identifying check kiting as a deceptive scheme prohibited by Section 1344(1) that makes no false representations); cf. *Williams* v. *United States*, 458 U.S. 279, 284-285 (1982) (holding that "a check is not a factual assertion" and that checks used in a check-kiting scheme therefore do not make "false statement[s]" about the drawer's account balance). Section 1344(2), in contrast, applies only when the scheme uses a "false statement [a]s the mechanism naturally inducing the bank (or custodian of bank property) to part with money in its control." *Loughrin*, 134 S. Ct. at 2393. Section 1344(2) therefore does not extend to all schemes prohibited by Section 1344(1). See *id.* at 2390 n.4. But Section 1344(2) serves the distinct function of covering schemes designed to cause "a non-bank custodian [to] giv[e] up bank[-owned] property that it holds." *Id.* at 2389.

2. In *Loughrin*, this Court resolved two questions about the scope of Section 1344(2). Loughrin contended that Section 1344(2) required the government to prove that "the defendant intended to defraud a bank" and that the "scheme created a risk of financial loss to the bank." 134 S. Ct. at 2389, 2395 n.9. The Court rejected both contentions. First, the Court held that no intent-to-defraud element appeared in the text

of Section 1344(2) and that, given that "all agree" that the text of Section 1344(1) "includes the requirement that a defendant intend to 'defraud a financial institution,'" no parallel requirement should be read into Section 1344(2). *Id.* at 2389-2390. The Court explained that Section 1344(2) applies to schemes designed to obtain all forms of bank property by means of false statements "naturally inducing a bank (or custodian of bank property) to part with money in its control," *id.* at 2393, and reasoned that none of Loughrin's contentions "avoid[ed] the import of the statute's plain text," *id.* at 2390. Second, the Court rejected what it characterized as Loughrin's "last-gasp argument," namely, the argument that Section 1344(2) requires proof that that defendant's scheme "created a risk of financial loss to the bank." *Id.* at 2395 n.9. The Court again noted the absence of any such textual requirement and added that Section 1344(2)'s broad text "appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Ibid.*

Loughrin articulated three interpretative principles that are relevant to the construction of Section 1344(1), the provision at issue here. First, while normal interpretive principles apply to the bank-fraud statute's language, "unstated element[s]" should not be read into its provisions. 134 S. Ct. at 2389-2390, 2394. Rather, the "plain text" controls. *Id.* at 2390. Second, given the related prohibitions Congress provided in the two clauses of Section 1344, "the overlap between [Section 1344(1) and Section 1344(2)] is substantial." *Id.* at 2390 n.4. The two clauses form a

Venn diagram, with each clause prohibiting conduct that the other does not, with a significant zone of common coverage. See *id.* at 2389, 2390 n.4. Third, complex rules that turn on "technical issues of banking law" have no place in defining the scope of Section 1344's protection against deceptive schemes. *Id.* at 2395 n.9. Applying those principles here, petitioner's non-textual limitations on the scope of Section 1344(1) meet the same fate as Loughrin's.

B. Bank Deposits Are A "Property" Interest That Section 1344(1) Protects From Fraudulent Schemes

Petitioner primarily argues (Br. i, 9, 12-13, 15-17, 31-34, 41, 44-45) that Section 1344(1)'s prohibition against the knowing execution of a "scheme to defraud" a bank prohibits "only" the execution of "schemes to obtain bank-owned property," not schemes to obtain "bank-held property" like "bank-customer money" within "the custody and control of the bank." Br. 9, 12-13. That argument misapprehends the breath of the term "scheme to defraud." That phrase, as used in the bank-fraud, mail-fraud, and wire-fraud statutes, protects all property interests against deceptive schemes—including possessory interests in property. Nothing in the concept of fraud embodied in those statutes limits its protection of property to ownership interests. As such, Section 1344(1) covers schemes to obtain bank deposits, whether or not the bank owns the deposits itself.

1. Section 1344(1)'s prohibition against a "scheme to defraud" a bank protects against deprivation of a broad spectrum of property interests, including both ownership and possessory interests

Congress "modeled [Section 1344] on the mail and wire fraud statutes" (18 U.S.C. 1341 and 1343) and copied the phrase "'scheme or artifice to defraud'" directly from those provisions. *Neder*, 527 U.S. at 20-21; see *Loughrin*, 134 S. Ct. at 2391. In doing so, Congress intended to build upon judicial decisions construing the "wire and mail fraud statutes * * * to reach a wide range of fraudulent activity." *Senate Report* 378. The phrase "scheme or artifice to defraud" in the bank fraud statute must therefore be read *in pari materia* with its counterparts in the mail- and wire-fraud statutes. See *Neder*, 527 U.S. at 20; see also *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) (mail and wire fraud). This Court's decisions construing those provisions show that a "scheme to defraud" a bank under Section 1344(1) is a scheme designed to deprive a bank of a property interest by deceiving the bank.[1]

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[1] Section 1344(1) differs from the mail- and wire-fraud statutes in that it applies to a "scheme or artifice * * * to defraud *a financial institution*," 18 U.S.C. 1344(1) (emphasis added), and not more generally to "scheme[s] or artifice[s] to defraud," 18 U.S.C. 1341, 1343. The government thus agrees with petitioner that that textual difference means that Section 1344(1) extends only to schemes designed to deprive a bank of a property interest by deceiving the bank. Cf. Pet. Br. 23-28 (arguing for that result because Section 1344(1) uses "financial institution" as the direct object of "defraud"; citing decisions construing different government-specific statutes with parallel phrasing, including *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 668 (2008) (false claim to government); *Tanner* v. *United States*, 483

a. Congress's use of the term "defraud" in the mail-fraud, wire-fraud, and bank-fraud contexts borrows meaning from the term's common-law usage. *Neder*, 527 U.S. at 22-23. "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). *McNally* accordingly determined that Section 1341's prohibition against use of the mail in "schemes or artifices 'to defraud'" was "limited in scope to the protection of property rights." *Id.* at 358, 360.[2]

A "property right" in this context, however, includes many forms of cognizable property interests. For more than a century, the Court has held that the phrase "'scheme or artifice to defraud'" must be "interpreted broadly insofar as property rights are concerned." *McNally*, 483 U.S. at 356 (citing *Durland* v. *United States*, 161 U.S. 306 (1896)). The Court has thus recognized that "property" in the wire-fraud context includes "[v]aluable entitlements" because the

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U.S. 107, 128 (1987) (defrauding the United States); *United States* v. *Cohn*, 270 U.S. 339, 343 (1926) (same)). The decisions petitioner cites, however, do not address the scope of the property interests protected by the mail-, wire-, and bank-fraud statutes, or whether those interests are limited to ownership interests in property. Cf. *McNally* v. *United States*, 483 U.S. 350, 359 n.8 (1987) (concluding that scope of the mail-fraud statute should not follow the scope of "a statute aimed at protecting the Federal Government alone").

[2] Congress responded to *McNally* by amending the fraud statutes to provide that for purposes of the relevant chapter, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see *Skilling* v. *United States*, 561 U.S. 358, 402 (2010). That provision is not at issue here.

concept of "property" ordinarily "'extend[s] to every species of valuable right and interest.'" *Pasquantino*, 544 U.S. at 356 (quoting *Black's Law Dictionary* 1382 (4th ed. 1951)). The Court has similarly recognized that the normal understanding of "property" includes not only ownership interests but also possessory interests. "In its dictionary definitions and in common usage 'property' comprehends anything of material value *owned or possessed*." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338 (1979) (emphasis added). That expansive understanding of "property" reflects *McNally*'s understanding that the term "defraud" "usually signif[ies] the deprivation of *something of value*"—*i.e.*, a property interest—"by trick, deceit, chicane or overreaching." 483 U.S. at 358 (emphasis added) (quoting *Hammerschmidt*, 265 U.S. at 188).

Consistent with that expansive understanding of property interests, the Court in *Carpenter* v. *United States*, 484 U.S. 19 (1987), held that a newspaper's intangible "right to exclusive *use* of the information" that it plans to publish is a property right protected under the fraud statutes, even though the schemers (who secretly used the information to make pre-publication stock trades) did "not interfere with the [newspaper's] use of the information," did "not publicize it" themselves, and did not cause the paper any "monetary loss." *Id.* at 26 (emphasis added). *Pasquantino* similarly concluded that where a liquor smuggling scheme deprived Canada of a right to uncollected excise taxes, that right was a "property" interest protected under the wire-fraud statute as "'something of value'" to Canada. 544 U.S. at 355-356 (quoting *McNally*, 483 U.S. at 358). Neither decision is consistent with petitioner's view that a "scheme to

defraud" a bank protects only the bank's ownership interest in property.

The Court has also recognized that interests in property that is not owned by an individual may fall with the broad scope of "property" protected in federal criminal law. For example, in *Cleveland* v. *United States*, 531 U.S. 12 (2000), the Court concluded that the "thing obtained [by a fraudulent scheme] must be property in the hands of the victim," *id.* at 15, and that an unissued video poker license in the hands of the State did not qualify, because the State's interest in the license was a "purely regulatory" one reflecting the exercise of its "sovereign [police] power to regulate," *id.* at 20-23 (citation omitted). But the Court did not question that an issued "video poker license[]" may constitute a "property interest[]" under the federal fraud statutes in the hands of the licensee. *Id.* at 25 & n.4.[3] More recently, when the Court confronted a similar issue concerning the scope of "property" protected under the Hobbs Act, 18 U.S.C. 1951, the Court declined to decide whether a "right to make a recommendation" qualifies as "property." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2726 n.5 (2013) (citation and brackets omitted). The Court suggested that it may well qualify as property, explaining that, if "one defines property to include anything of value," "surely

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[3] The Court did not resolve that issue, but it analogized such issued licenses to other "state-issued licenses essential to pursuing an occupation or livelihood," such as a driver's license, in which the Court has held that "individuals have constitutionally protected property interests." *Cleveland*, 531 U.S. at 26 n.4 (citing *Bell* v. *Burson*, 402 U.S. 535, 539 (1971)). An individual's interest in such licenses would not typically be described as an "ownership" interest. See *Bell*, 402 U.S. at 539 (referring to an interest in "continued possession" of an issued driver's license).

some rights to make recommendations would qualify." *Ibid.*

b. Section 1344(1)'s protection of possessory interests as a form of "property" reflects the normal understanding of that term, which encompasses "anything of material value owned or *possessed*." *Reiter*, 442 U.S. at 338 (emphasis added). No one would doubt that a lessee, who holds a "possessory interest" in land, see *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295, 303 (1976); *Black's Law Dictionary* 1027 (10th ed. 2014) (defining "leasehold" as "[a] tenant's possessory estate in land or premises), has a property interest. See, *e.g.*, *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 368 (1925) (recognizing, for tax purposes, that an interest in mining leases constituted "property"). And that is so even though the lessee does not hold an ownership interest in the land itself. *Black's Law Dictionary* 1353 (10th ed. 2014) (defining "possessory interest" as "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner").

Similarly, a bailee's possessory interest in an item that it holds for the bailor is properly characterized as a type of "property" interest in this context. *Black's Law Dictionary* 168 (10th ed. 2014) (defining "bailee" as "[s]omeone who receives personal property from another, and has possession of but not title to the property"). And to the extent that a bank holds a customer's deposit as a bailee, its possessory interest is something of value that qualifies as a property interest protected by the bank-fraud statute. Blackstone concluded long ago that when a bailee takes possession of goods from a bailor, the bailee acquires "a special qualified property" that permits him to

maintain an action to "vindicate, in [his] own right," his "possessory interest[] against any stranger" who may "injure or take away" the goods. 2 William Blackstone, *Commentaries on the Laws of England* 453-454 (1766) (Blackstone); see *id.* at 395-396. Justice Story similarly concluded that the bailee's "lawful right of custody or possession of [goods]" will "constitute[] a sufficient title to maintain" an action for damages "against a stranger[] for injury to," or conversion of, the goods. Joseph Story, *Commentaries on the Law of Bailments* §§ 93g, 94, at 98-99, 102 (8th ed. 1870) (suggesting that use of the term "special property" may not be apt in the context of a bailee who lacks an interest for which he could detain the thing against its owner).

And this Court in a variety of contexts has similarly deemed non-ownership possessory interests to be a type of "property" for constitutional purposes. Cf. *Cleveland*, 531 U.S. at 25 & n.4 (drawing analogy to constitutionally protected property interests in suggesting that issued video poker license may constitute "property" under federal fraud law). The Fifth and Fourteenth Amendments' protections against deprivations of property without due process of law, for instance, extend to the deprivation of a "right to continued possession" of goods. See *Fuentes* v. *Shevin*, 407 U.S. 67, 86-87 & n.16 (1972) (goods held by consumer under installment sale agreement before consumer obtained ownership); see also, *e.g.*, *Sanders* v. *City of San Diego*, 93 F.3d 1423, 1426-1427 (9th Cir. 1996) (pawnbroker's possession of goods owned by customer). A "'seizure' of property" regulated by the Fourth Amendment likewise occurs when there is "'some meaningful interference with an individual's possesso-

ry interests in that property.'" *Soldal* v. *Cook Cnty.*, 506 U.S. 56, 61 (1992) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). And the Just Compensation Clause of the Fifth Amendment applies to takings of leaseholds. See *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 476 (1973).

No sound reason exists for a different result in the bank-fraud context. Nothing suggests that Congress wanted to distinguish deposits owned by a bank and deposits in which the bank holds possession. To the contrary, Congress enacted the bank-fraud statute as a broad prohibition to "reach a wide range of fraudulent activity." *Senate Report* 378. The statute thus covers all such schemes to defraud a bank that target any funds held by the bank, whether the bank owns those funds or holds them as a bailee for its customer. That result makes good sense. Even when the bank merely holds funds for its customer, as Blackstone observed, "such [a] bailee is responsible to the [customer who owns the funds]," 2 Blackstone 454.

2. Section 1344's structure does not limit Section 1344(1)'s protections only to bank ownership interests in property

Petitioner nevertheless contends (Br. 30-33) that textual differences between Section 1344(1) and Section 1344(2) support his position. He argues (Br. 32) that Section 1344(2), which prohibits certain schemes to obtain "property owned by, or under the custody or control of, a [bank]," 18 U.S.C. 1344(2), shows that Congress "recognized the distinction between"—and "knew how to draft a statute" that would reach—both "schemes that target bank-owned property and those that target bank-held property." Petitioner concludes

(Br. 32) that Congress's choice of different language in Section 1344(1) reflects a choice to limit Section 1344(1) to just bank-owned property. The inferences that petitioner draws from his comparison of the two clauses are illogical and at odds with Section 1344's origins.

First, as a matter of logic, petitioner incorrectly asserts (Br. 31) that Section 1344(2) addresses only two categories of property: "bank-owned property" and "bank-held property." Petitioner views (*ibid.*) that dichotomy as illustrating that a "scheme to obtain property 'owned by' a bank is not a scheme to obtain property 'in the custody or control of' a bank," and that only the former is covered by Section 1344(1). In fact, Section 1344(2) covers three related categories: (1) property owned by the bank *and* in its custody or control; (2) property not owned by the bank but in its custody or control; and (3) "property 'owned by' the bank but in someone else's custody and control," *Loughrin*, 134 S. Ct. at 2389. See 18 U.S.C. 1344(2). Nothing in Clause (2)'s coverage of all three categories implies that Clause (1) covers only one category. As explained, while each clause covers ground that the other does not, the overlap remains "substantial." *Loughrin*, 134 S. Ct. at 2390 n.4. And petitioner provides no particularized reason to believe that Congress intended Clause (1) to protect against schemes to defraud the bank of property it owned, but not of property that it possessed.

Second, petitioner's approach overlooks the relationship between Section 1344 and its mail- and wire-fraud predecessors. When Congress enacted Section 1344 in 1984, it intentionally "modeled" the statutory text on the "wire and mail fraud statutes" in order to

build upon the judicial decisions that had construed those statutes "to reach a wide range of fraudulent activity." *Senate Report* 378. Congress accordingly copied the phrase "scheme or artifice to defraud" directly from the mail- and wire-fraud statutes and inserted it into Section 1344(1). See *Neder*, 527 U.S. at 20-21. It follows that Congress would have expected Section 1344(1), like its predecessors, to be "interpreted *broadly* insofar as property rights are concerned"—a position that was established in the Court's 1896 decision in *Durland*. *McNally*, 483 U.S. at 356 (emphasis added). Petitioner's restrictive understanding of the "property" interests protected by Section 1344 disregards Congress's intent to borrow preexisting text to ensure the broad application of Section 1344(1).

3. Section 1344's legislative history does not support petitioner's bank-owned property theory

Petitioner's uncontroversial discussion (Br. 34-40) of Section 1344's legislative history does not assist him.[4] Nothing in that history reflects any congressional desire to impose petitioner's bank-owned-property limitation upon Section 1344(1).

a. Congress enacted Section 1344 in the wake of three decisions by this Court addressing bank-fraud prosecutions. *Senate Report* 377-378 & n.3. Those decisions showed that the government's prior "approach of prosecuting bank fraud under statutes not specifically designed" for that purpose had become

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[4] Much of petitioner's recitation tracks the history described in the government's brief in *Loughrin*. Compare Br. 16 n.7, 34-40, with U.S. Br. at 2-3, 27-29, 35-36 & n.7, *Loughrin*, *supra* (No. 13-316).

"problematic" after the decisions identified significant "gaps in [those] existing statutes." *Id.* at 377-378 (discussing *United States* v. *Maze*, 414 U.S. 395 (1974) (mail fraud, 18 U.S.C. 1341); *Williams*, *supra* (bank false statement, 18 U.S.C. 1014); and *Bell* v. *United States*, 462 U.S. 356 (1983) (bank theft, 18 U.S.C. 2113(b)).

Maze, for instance, involved a defendant who forged the cardholder's signature on a stolen bank-issued credit card to make purchases at various merchants. 414 U.S. at 396-397. The Court concluded that the merchants, the bank that issued the card, and the card owner were "all * * * victims of [the fraudulent] scheme," regardless "which of [the] victims ultimately bore the loss," but it concluded that the *mailing element* of the mail-fraud statute was not satisfied by post-purchase mailings directed toward "adjusting accounts between * * * th[ose] victims." *Id.* at 402. *Williams* and *Bell* similarly highlighted the limitations of the false-statement and bank-theft provisions that the government had used after *Maze* to prosecute a (more limited) number of bank-fraud offenses. See *Senate Report* 378 & n.3.

Section 1344's legislative history, however, does not discuss whether any particular type of bank-fraud scheme would be prosecutable under only Section 1344(1), Section 1344(2), or both, much less indicate an intent that Section 1344(1) be limited to schemes that target bank-owned property. To the contrary, *Maze* cuts against petitioner's position. Because Congress reacted to *Maze* by enacting Section 1344, which Congress intended to "reach a wide range of fraudulent activity," *Senate Report* 378, Congress would have logically intended to protect banks victimized by fraud

regardless whether such banks would "ultimately b[ear] the loss" of such fraud, *Maze*, 414 U.S. at 402. Even when a fraud scheme targets non-bank-owned property that a bank keeps in its custody for a customer, the need to allocate any resulting loss and the uncertainty about which party would bear it has the potential to impose financial costs upon the bank.

b. Petitioner's reliance (Br. 39) on the Senate Committee's desire to "protect[] the financial integrity of [financial] institutions," *Senate Report* 377, does not assist him. Petitioner provides no sensible basis for believing that Congress wished to further that interest by limiting Section 1344(1) to schemes whose "*object*" is to "target property 'owned by' the bank" and to require "evidence of intent" on this point. Br. 17 n.8, 45.

Regardless whether the property that a scheme targets is owned by the bank itself or is just in the bank's custody or control, the financial impact of such a scheme, as the court of appeals recognized, will normally turn on "the operation of banking laws" and practices governing who bears the loss. J.A. 46, 55. This case illustrates the point. Once petitioner's fraud was discovered, BoA was able under the governing National Automated Clearing House Association (NACHA) Operating Rules for the ACH transfers in question to reverse the unauthorized transfers from Hsu's account that occurred within (approximately) the last 60 days, thus shifting the loss for those transfers to PayPal.[5] Liability for the earlier withdrawals

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[5] The banking practice discussed at trial (see p. 4, *supra*), reflects a practice embodied in NACHA Operating Rules, the relevant portions of which have not materially changed since 2007.

that fell outside that window, in turn, should have been governed by the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and its implementing regulation, known as Regulation E, 12 C.F.R. Pt. 1005 (formerly 12 C.F.R. Pt. 205 (2007)). Those provisions provide limitations on a banking consumer's liability and therefore in some circumstances result in the bank's bearing the loss or sharing it with its customer. See 15 U.S.C. 1693g(a); 12 C.F.R. 1005.6(b)(3).[6] The

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If a banking consumer provides an appropriate written statement that an ACH withdrawal from his account was unauthorized, the NACHA Operating Rules generally allow a bank in BoA's position (a Receiving Depository Financial Institution (RDFI)) to return the original ACH withdrawal request to the bank that originated the request (an Originating Depository Financial Institution (ODFI)) on behalf of an entity like PayPal if the RDFI recredits the consumer's account and submits the return entry so that it can be made available to the ODFI "no later than the opening of business on the Banking Day following the sixtieth calendar date following the Settlement Date of the original [withdrawal request]". NACHA Operating R. § 3.13.1(b) (2016); see *id.* §§ 8.37(b), 8.41, 8.66, 8.83, 8.101 (definitions); see also *id.* § 8.7.1 (2007). Compare NACHA Operating R. App. Pt. 4.2 (2016) (table listing "R10" return code as "Customer Advises Unauthorized"), with C.A. E.R. 388 (BoA submitted "R-10" code "indicating [each of 16 ACH transfers] was unauthorized"). Because the ODFI "must accept" such a timely and properly submitted return entry, NACHA Operating R. § 2.12.1 (2016); see *id.* § 6.1.6 (2007), the unauthorized transfer is then, in effect, reversed. Cf. C.A. E.R. 387-388, 432 (BoA initiated "auto-reversals" of the 16 "ACH" transfers); Gov't Ex. 98, at 2 (showing credits to Hsu's new account for the 16 reversed "ACH" transactions that originally posted from August 27 and October 15, 2007).

[6] A consumer can be liable up to $500 for a series of unauthorized electronic fund transfers that involve the use of an "accepted access device." 12 C.F.R. 1005.6(a), (b)(1), and (2); see 12 C.F.R. 1005.2(a)(2). Regardless whether such a device is used, a consum-

key point, however, is that petitioner's bank-owned-property theory could limit the reach of Section 1344(1) even though the complex regulatory regime governing such frauds may end up placing the loss squarely on the shoulders of the bank.[7] Nothing suggests that Congress wanted frauds that could weaken a bank's financial integrity to be off limits to prosecution in these circumstances.

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er can be additionally liable for the full amount of unauthorized transfers that occur after he fails to "report [to his bank] an unauthorized electronic fund transfer [from his account] that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement." 12 C.F.R. 1005.6(b)(3); see 15 U.S.C. 1693g(a); 12 C.F.R. 1005.2(m). A consumer therefore has no additional liability for either (a) unauthorized transfers that occur before the bank sends him the statement showing the first unauthorized transfer or (b) unauthorized transfers occurring within 60 days after the statement's transmittal. 12 C.F.R. 1005.6(b)(3). The consumer's liability instead extends (unless limited further by state law or contract) to all "subsequent [unauthorized] transfers" that occur after the lapse of the 60-day period and "before [he gives] notice to the institution" if the institution "establishes [that the transfers] would not have occurred" if it had been notified within the 60-day period. *Ibid.*; see 15 U.S.C. 1693g(a) and (d); 12 C.F.R. 1005.6(b)(6); see also 12 C.F.R. Pt. 1005, Supp. I, at 226 (official interpretation).

[7] Whether a bank suffers a financial loss can also depend on whether banking personnel are fully aware of such rules or whether the bank decides to compensate its customer beyond its legal obligation to do so. Cf. *United States* v. *Stavroulakis*, 952 F.2d 686, 695 (2d Cir.) (noting that banks "will often swallow the loss for the customer" for a forged check, even if "the bank is not legally liable"), cert. denied, 504 U.S. 926 (1992).

4. No sound reason exists for basing criminal liability on a defendant's subjective belief about whether the bank itself owns the property targeted by a fraudulent scheme

Petitioner appears to suggest that whether the property targeted by a scheme is, in fact, bank-owned property does not control whether Section 1344(1) should apply. Petitioner instead appears to contend that Section 1344(1) requires that the scheme target property that the defendant himself *believes* is owned by the bank. See, *e.g.*, Br. 17 n.8 (arguing that "the *object* of the scheme," and "not whether a bank in fact owns the property," controls); Br. 45 (arguing that a scheme to target property owned by a bank's customer "is not a scheme to target property 'owned by' the bank, *absent contrary evidence of intent*") (emphasis added). That position does not rationally advance an interest in protecting the financial integrity of banks, nor does it distinguish between criminal and non-criminal intent.

Congress would have had no reason to prohibit only those schemes in which the schemer *believes*—rightly or wrongly—that the bank holds an ownership interest in the property targeted by the scheme. It is a question of federal law whether something targeted by a scheme qualifies as a "property" interest protected by the federal fraud statutes. *Cleveland*, 531 U.S. at 25 n.4. Yet none of this Court's decisions discussing the "property" interests protected by those statutes (*e.g.*, *McNally*, *Carpenter*, *Cleveland*, *Pasquantino*) suggests that the scope of a federal fraud statute's reach depends on the defendant's subjective belief about whether that thing is a "property" interest in

the hands of the victim. Petitioner offers no sound reason for such a strange liability regime.

A layperson's (likely non-existent) beliefs about the legal status of property interests do not sensibly differentiate "criminal from non-criminal conduct." See *United States* v. *Nkansah*, 699 F.3d 743, 757 (2d Cir. 2012) (Lynch, J., concurring in part and concurring in the judgment in part). Even if a fraudster, like many citizens (and even quite a few lawyers), lacks expertise in property law, he can possess the requisite knowledge that he is seeking to deprive a bank of property through deception. Petitioner, for example—like the fraudster that Judge Lynch described in *Nkansah*—undoubtedly "had a criminally fraudulent intent," because "[h]is goal was to get money to which he was not entitled, with no intention of paying it back." *Ibid.* Even petitioner admits his conduct—directing false representations to banks to get money in a customer's account—could be charged under federal criminal law, just not under Section 1344(1). See Br. 11, 13, 44-46 & nn.18-19 (admitting that petitioner's scheme reflects "the paradigmatic" violation of Section 1344(2), and might also be chargeable under the mail- and wire-fraud statutes).

Similarly, an individual's beliefs about the scope of the bank's ownership interests have no bearing on the threat to the banking system posed by schemes that target money or property held by a bank. See pp. 27-29, *supra*. A schemer's belief that he is only targeting an account holder does not alleviate the financial consequences if, as a regulatory matter, the bank must bear the loss, or elects as a matter of customary banking practice to do so. Limiting Section 1344(1) to only those bank-fraud schemes that target money in a bank

for which (the schemer believes) the bank has an ownership interest would threaten to produce arbitrary results by introducing a new proof requirement that simply creates uncertainty about the proper basis under which to charge conduct.

5. Petitioner's bank-owned property theory is a particularly anomalous one to apply in the banking context

Petitioner argues (Br. 13, 41-47) that his theory would not be disruptive because many types of bank-fraud schemes might be prosecuted under Section 1344(2) rather than Section 1344(1). But that observation does not assist him. The "substantial" overlap between the two clauses means that the ability to prosecute under one is not a reason to truncate the other. See *Loughrin*, 134 S. Ct. at 2390 n.4. And creating uncertainty about that zone of overlap only would result in either duplicative charging or windfalls for defendants like petitioner. In any event, petitioner's bank-owned property theory is particularly anomalous as applied to bank deposits. A scheme targeting a customer's deposit account is one that targets funds that, as a legal matter, are owned by the bank. Petitioner's theory thus appears to rest on a fundamental misunderstanding of the banking system, and it illustrates the pitfalls of tying liability under Section 1344(1) to technical property distinctions.

a. "All deposits made with bankers may be divided into two classes," known as general and special deposits. *Marine Bank* v. *Fulton Bank*, 69 U.S. (2 Wall.) 252, 256 (1865); see 5C *Michie on Banks and Banking*, ch. 9, § 328, at 187-188 (2015) (*Michie*).

i. A "[g]eneral [d]eposit" reflects the ordinary "relation[ship] between a bank and its depositor." 5A

Michie ch. 9, § 1, at 1 (2014). As such, a "deposit of money in a bank in the ordinary course of business is presumed to be [a] general [deposit]" "[i]n the absence of evidence to the contrary." 5C *Michie* ch. 9, § 328, at 193; accord *Dean Witter Reynolds, Inc.* v. *Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1107 (10th Cir. 2004) (McConnell, J.).

When a banking customer makes a normal (general) deposit with a bank, the depositor "parts with the title to his money" and ownership of the deposit vests immediately with the bank. *Phoenix Bank* v. *Risley*, 111 U.S. 125, 127 (1884) (citations omitted) (describing "settled doctrine"); accord *Burton* v. *United States*, 196 U.S. 283, 302-303 (1905); *Crocker-Citizens Nat'l Bank* v. *Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977); see 5A *Michie* ch. 9, § 38, at 162 ("[A] general deposit passes title to the financial institution."). "The money deposited [then] becomes part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to [other] customers, and parted with at the will of the bank." 5A *Michie* ch. 9, § 1, at 3-5. "[T]he bank becomes the debtor of the depositor," and it "repay[s] the [debt] on [the depositor's] demand or order" by, for instance, "honoring checks drawn against the deposits." *Id.* at 6-7, 24; see *Bank of Marin* v. *England*, 385 U.S. 99, 101-102 (1966). Thus, if the depositor can "draw[] a draft against the account," "[t]he fact that a fund may be checked upon implies that it is a general deposit." 5C *Michie* ch. 9, § 334, at 237; see *Jensen* v. *State Bank of Allison*, 518 F.2d 1, 4 n.3 (8th Cir. 1975) ("A checking account is an account of general deposit.") (citing *Kruger* v. *Wells Fargo Bank*, 521 P.2d 441, 444 n.5 (Cal. 1974)).

Such deposits are "an important part of the business of banking" because the money deposited "become[s] part of [the bank's] general funds" and therefore "can be loaned by [the bank] as other moneys." *Bank of the Republic* v. *Millard*, 77 U.S. (10 Wall.) 152, 155 (1870). The bank is able to secure "the right to use [the deposited funds] for [its] own profit" only because it obtains ownership of (*i.e.*, "title to") the deposit. See *Phoenix Bank*, 111 U.S. at 127 (citation omitted). If a depositor were to retain ownership, the bank would be unable to spend the funds to finance its operations. And "in return for loaning money to [the] bank so that [the] bank may use [the deposited] funds for its own investments," the "depositor [often] receives interest" on the balance of his account. 5A *Michie* ch. 9, § 38, at 166. The "[f]act that [a] bank pays interest on [an] account" is therefore "very strong evidence that title to [the] money deposited" has passed to the bank. *Ibid.*; accord *Scammon* v. *Kimball*, 92 U.S. 362, 370 (1876).

ii. The other form of deposit—a "special deposit"—is a "deposit for safekeeping, to be returned intact on demand, or for some specific purpose not contemplating a credit on [a] general account." 5C *Michie* ch. 9, § 328, at 200. A special deposit must be "made under an express or clearly implied agreement that it is for some particular purpose" for which the bank "merely assumes charge or custody without authority to use the deposit" in its own dealings. *Id.* at 199, 202-203. The bank thereby "becomes a [type of] bailee" with possession of the deposit, while "title remains in the depositor." *Id.* at 203-204; see *Scammon*, 92 U.S. at 370 ("[T]he bank becomes bailee of the depositor" with respect to special deposits); *Marine Bank*, 69 U.S. at

256 (explaining that "the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter"). As a result, if a bank receives a special deposit, the bank is prohibited from "mingl[ing] the deposit with its general assets" as it could with a general deposit. 5C *Michie* ch. 9, § 328, at 200-201. Cf. Richard A. Lord, *The Legal History of Safekeeping and Safe Deposit Activities in the United States*, 38 Ark. L. Rev. 727 (1985) (discussing history of "special deposit" services in the form of bank safe deposit boxes and safekeeping services).

b. The fact that bank funds used to originate loans or pay overdrafts in check-kiting schemes are the same bank-owned funds that banks obtain from a customer's general deposits illustrates that petitioner's position is based on a basic misunderstanding of the banking system. If, as petitioner suggests (Br. 13, 42-43), loan-fraud and check-kiting are covered by Section 1344(1), then so too are schemes targeting funds in a customer's account. Indeed, petitioner's attempt to distinguish bank-customer property from bank-owned property does not even work in the context of this case.[8] And, more broadly, the distinctions

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[8] The evidence demonstrates that petitioner's scheme targeted money that BoA owned. The BoA account from which petitioner drained over $300,000 was a checking account in Hsu's name, Gov't Ex. 1, at 4-5 (bank statement); cf. C.A. E.R. 495, thus indicating that the account was a "general deposit" account, 5C *Michie* ch. 9, § 334, at 237. Petitioner's ability to order 39 separate electronic fund transfers out of the account to PayPal, see p. 3, *supra*, similarly reflects that Hsu's account was a general deposit account, not one for a special purpose. Finally, the BoA statements show that BoA paid monthly interest to Hsu on his checking account. See, *e.g.*, Gov't Ex. 1, at 4-5, 7-8, 10-11, 13-14. Those payments are "very strong evidence" that the account was a general deposit

among the various types of accounts have no relation to the purpose of the bank-fraud statute to protect banks against deceptive schemes. Accordingly, petitioner's "bank-owned property" test should be rejected.[9]

C. Section 1344(1) Requires Proof Of An Intent To Deceive A Bank, Not To Cause It Monetary Loss

Petitioner's proposed jury instructions focused not on whether the charged scheme targeted bank-owned property, but on whether the scheme was designed to victimize the banks by causing monetary loss, and whether petitioner had acted with the "intent to

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account and that BoA held "title to the money" deposited therein. *Scammon*, 92 U.S. at 370. Nothing in the record undermines the legal conclusion that the BoA did, in fact, have title to the money targeted in petitioner's scheme.

[9] As a final submission, petitioner invokes (Br. 40-41) the rule of lenity, but that invocation is misplaced. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations and internal quotation marks omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted); see *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Because petitioner's position cannot be squared with the text and structure of Section 1344(1), as informed by the common-law understanding of fraud and the intended role of the bank-fraud statute, the rule of lenity has no application here.

deceive and cheat" the banks "in order to expose" them to "monetary loss." J.A. 22-25. To the extent that petitioner continues to press that specific-intent argument—the only one he properly preserved—it lacks merit.

Petitioner acknowledges (Br. 17 n.8) that Section 1344(1) does not require a showing that a fraudulent scheme caused a bank "actual damage[]" or posed any actual "risk of financial loss" to the bank. Rather, petitioner made clear at the certiorari stage that "[his] position [wa]s not that [Section] 1344(1) requires proof of 'risk of loss,' * * * but rather proof that the defendant *intended* to expose the bank to actual or potential loss." Pet. 23. Petitioner is incorrect. Section 1344(1)'s text and drafting history, and practical consequences, make clear that Congress included no requirement that the defendant intend to harm a bank.

1. Section 1344(1)'s text and drafting history are incompatible with an intent-to-harm-the-bank requirement

a. Section 1344(1)'s prohibition against executing of a scheme "to defraud a financial institution," 18 U.S.C. 1344(1), does not include an intent-to-harm-the-bank requirement. Congress's use of the phrase "scheme to defraud" incorporates the intent required in a common-law action for fraud. See *Neder*, 527 U.S. at 23 (construing this phrase by applying the presumption that "Congress intends to incorporate the well-settled meaning of common-law terms it uses").

That mental state is a culpable intent to "deceive," not to harm.[10]

The central feature of fraud has always been "deception or trickery." *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016). Justice Story explains that "fraud" was understood as early as Roman times to include "any cunning, deception, or artifice, used to circumvent, cheat, or deceive another." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 219 (6th ed. 1853). By the Founding, Story observes, Pothier similarly described the concept as "appl[ying] to every artifice made use of by one person for the purpose of deceiving another." *Ibid.* That focus on deception underlies the common law's definition of fraudulent intent.

An intent to defraud at common law was an "[i]ntent to [d]eceive." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 107, at 741 (5th ed. 1984) (*Prosser on Torts*) (emphasis omitted) (explaining that the requisite mental element was "the intent to de-

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[10] In multi-member fraud schemes, different actors may have different roles and different intentions with respect to execution of the scheme. *Cf. Ocasio* v. *United States*, 136 S. Ct. 1423, 1429 (2016) (conspiracy liability requires a defendant to harbor the "'specific intent that the underlying crime be committed' by some member of the conspiracy," not that he agreed to commit it himself) (emphasis and citation omitted). See generally *United States* v. *Joyce*, 499 F.2d 9, 17 (7th Cir.) (joining "at least six other circuits in applying conspiracy principles to a multimember mail fraud scheme"), cert. denied, 419 U.S. 1031 (1974). The *scheme* must be designed to deceive; but an individual schemer working with a group may be liable based on his knowledge of the scheme's objective whether or not he had a purpose to deceive. Of course, in a single-actor bank-fraud scheme, proof of the scheme and the defendant's intent will almost always converge.

ceive, to mislead, to convey a false impression"). In other words, the intent required to establish an action for fraud was an "intent[] to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation." *Id.* § 105, at 728; see Restatement (Second) of Torts § 525 (1976) ("One who fraudulently makes a misrepresentation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th ed. 1876) (*Addison on Torts*) ("[I]f a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, * * * the party telling the falsehood is responsible in damages in an action for deceit.").[11] As a result, under common law, "culpability" for misrepresentations was based on the mere existence of an "intent to deceive, to mislead, [or] to convey a false impression."[12] *Prosser on Torts* § 107, at 741.

Although a fraudster's "intent to accomplish an ultimate purpose" of his scheme—such as an intent to "harm" the victim—was sometimes relevant at com-

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[11] See also 37 Am. Jur. 2d *Fraud and Deceit* § 109, at 146-148 (2013) (describing "fraudulent intent" as "an intent to deceive or mislead"); 37 C.J.S. *Fraud* § 42, at 225 (2008) (explaining that "an essential element of fraud is that there must be a fraudulent intent, an intent to deceive, or the equivalent thereof," and equating such intent with "[a] specific intent to defraud") (footnotes omitted).

[12] The common law also required proof of damages resulting from the fraud. See *Neder*, 527 U.S. at 25. As noted above, however, that requirement "ha[s] no place in the federal fraud statutes," which more broadly prohibit a "'scheme to defraud,' rather than [a] completed fraud." *Ibid.*

mon law, it was relevant *only* to whether punitive damages were warranted, not to whether the defendant had "culpab[le]" intent. *Prosser on Torts* § 107, at 741; see, *e.g.*, 2 *Addison on Torts* § 1175, at 1005 ("In order to maintain an action for deceit, * * * it is not necessary to prove that the false representation was made from * * * a wicked motive of injury to the plaintiff."); Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 538-539 (1888) ("[I]t is not necessary, even in an action for damages, for the plaintiff to prove that the defendant intended to injure him."); Henry T. Terry, *Intent to Defraud*, 25 Yale L.J. 87, 99 (1915) (explaining that the "maker of the representation * * * need not intend to cause any actual harm or loss"). Thus, just as "common-law fraud has no additional 'intent to harm' requirement," *United States* v. *Kenrick*, 221 F.3d 19, 28 (1st Cir.) (en banc), cert. denied, 531 U.S. 961, and 531 U.S. 1042 (2000), abrogated in part on other grounds by *Loughrin*, 134 S. Ct. at 2388 n.2, neither does Section 1344(1).

Indeed, the absence of an intent-to-harm requirement in Section 1344(1) is strongly supported by this Court's decision in *Carpenter*, *supra*, which upheld fraud convictions under the mail- and wire-fraud statutes on which Section 1344(1) was based. The defendants there schemed to use non-public information obtained from a newspaper to purchase stocks whose price would be affected upon publication of the information, but they neither intended to cause the newspaper monetary harm nor in fact did so. 484 U.S. at 22-26. *Carpenter* thus indicates that no similar intent-to-harm requirement should be read into Section

1344(1). Cf. *Loughrin*, 134 S. Ct. at 2389 (rejecting "extra-textual limit on" Section 1344 (2)'s "compass").

b. An intent-to-harm requirement would also be inconsistent with Section 1344(1)'s drafting history, which demonstrates that Congress rejected language that would have required proof of intent to harm a bank.

After the Senate passed the Comprehensive Crime Control Act bill (S. 1762, 98th Cong.) containing the text ultimately enacted as Section 1344, see 130 Cong. Rec. 1587, 1636-1637 (1984); *Senate Report* 377-379, 772; cf. 18 U.S.C. 1344 (1988), a House subcommittee hearing addressed the relevant portions of S. 1762 and a competing House measure (H.R. 5405). *Financial Bribery and Fraud: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984). The House bill was narrower than its Senate counterpart, defining a Section 1344 offense as knowingly "devis[ing] *a plan* to obtain the property of a national credit institution, or *to cause economic loss* to such an institution by fraudulent means." *Id.* at 19 (emphasis added). The Department of Justice "strongly urge[d]" the subcommittee "to follow the format in * * * S. 1762" because, the Department explained, Section 1344 should be given "broader coverage" and the Senate text was "modeled on the present mail and wire fraud statutes deliberately to incorporate [the] existing case law," which did not limit the offenses to "situations where the object of the fraud is to obtain money or inflict an economic loss." *Id.* at 4, 12.

The House bill was later reported as a clean bill (H.R. 5872) with revisions to "address[] some of the Justice Department's concerns" by adopting S. 1762's

language so as "to incorporate case law" giving "expansive interpretations" to the mail- and wire-fraud statutes. H.R. Rep. No. 901, 98th Cong., 2d Sess. 3-4 (1984). The House passed that bill, which deleted the earlier text addressing schemes "to cause economic loss to [a bank]." See 130 Cong. Rec. at 21,492-21,493.[13] Congress thereby rejected the very requirement that petitioner has advocated: a requirement that the scheme be intended to cause harm to a bank.

2. An intent-to-harm-the-bank requirement is unsound

a. An intent-to-harm-the-bank requirement would serve no evident legislative goal. To the extent petitioner believes that Congress enacted Section 1344(1) in part to protect the financial integrity of banks, cf. Br. 39, it would not be practicable in criminal prosecutions to distinguish between the risks posed to banks by different types of schemes designed to obtain money held by a bank. Attempting to do so would implicate technical issues of banking law governing which parties bear the loss in particular types of transactions. And basing criminal liability on a defendant's

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[13] The House-passed version of Section 1344(2) remained narrower than the Senate measure because it did not include text targeting schemes to obtain non-bank-owned property "under the custody or control" of a bank. See 130 Cong. Rec. at 21,492. Proponents of the Senate's broader approach thus inserted the Senate-passed text of S. 1762 (introduced as H.R. 5963) into pending legislation (H.R. J. Res. 648) that the House passed. 130 Cong. Rec. at 26,780-26,781, 26,834-26,838; see *id.* at 26,727-26,728. After the Senate concurred with amendments not relevant here, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415-419 (1984), Section 1344 was enacted into law. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147.

understanding of whether a bank or another entity would be exposed to loss is an even less sensible standard. Such an intent-to-harm-the-bank requirement would lead to arbitrary results in prosecutions having no relationship to actual criminal culpability or to the risks posed to the banking sector by such schemes. See pp. 27-32, *supra*.

Rules governing the allocation of loss from fraud, moreover, depend on the nature of the fraudulent transaction. The rules for determining a bank's liability for a fraudulent check after the bank has honored it, for instance, are set forth in the Uniform Commercial Code, as incorporated into state law. See *J. Walter Thompson, U.S.A., Inc.* v. *First BankAmericano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008). A leading treatise describes the material in its chapter on "Basic Liability Arising from Stolen Instruments and Forged Signatures" as "abstract, difficult, and interrelated," and "'for adults only.'" 2 James J. White et al., *Uniform Commercial Code* § 19:1, at 311, 318 (6th ed. 2013); see *id.* at 313 (explaining that "[t]heft, forgery, and alteration of negotiable instruments have generated thousands of litigated cases"). Another treatise has multiple chapters discussing the liability rules for check kiting, check fraud via forged and counterfeit checks, check fraud by alteration, and check fraud through forged indorsements. 2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Chs. 9-12 (3d ed. 2016). Most of these detailed rules are foreign to "anyone but a small cadre of bankers, banking lawyers, and law professors." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring in part and concurring in the judgment in part). Such complexities would make it impracticable to adminis-

ter in principled fashion a criminal prohibition that bases guilt on the risk of loss that a fraudulent scheme would pose to a bank.

b. Petitioner has argued (Pet. 23-24) that his focus on the defendant's intent to harm a bank would not entangle courts in "technical issues of banking law" because the bank's actual risk of loss is irrelevant. Petitioner illustrated his point by arguing (Pet. 23) that the jury could infer intent, for instance, when evidence shows that a bank was "obligated to pay a cashier's check written on non-sufficient funds." But such evidence not only directly implicates "technical issues of banking law," it does so through the even less sensible lens of a criminal defendant's inferred knowledge of such law.

Indeed, an intent-to-harm requirement would draw a distinction between *identical* fraudulent schemes based on whether the defendant desired to inflict the loss on the bank, or was merely indifferent about who would bear the loss. But the dangers posed by bank-fraud schemes targeting money in the custody or control of banks in no way depend on a schemer's "anti-bank animus." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring in part and concurring in the judgment in part). "A scheme that is intended to harm third parties may, in fact, end up hurting the bank," J.A. 55, even if "the perpetrator *believes* [it] will damage only some other party," *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring in part and concurring in the judgment in part). Likewise, a scheme "*intended* to harm a bank may in the end impose no costs on the institution if the schemer misunderstands who will be responsible for the loss." *Ibid.* The danger to a bank is posed by the nature of the fraudulent

scheme itself, which targets money held by the bank. No good reason exists why Congress would have wanted bank-fraud liability to turn on the schemer's purposes on these issues.

D. Petitioner's Remaining Challenges To The Jury Instructions Lack Merit

The jury instructions in this case correctly conveyed the elements of bank-fraud under Section 1344(1). The district court instructed that a Section 1344(1) offense requires proof of "a scheme to defraud a financial institution as to a material matter," J.A. 17, and that a "scheme to defraud" is "any deliberate plan of action or course of conduct" (a scheme) "by which someone intends to deceive, cheat, or deprive a financial institution of something of value" (to defraud), J.A. 18. By instructing that the scheme must be a scheme to defraud a bank "as to a material matter," J.A. 17, the court made clear that the scheme must be one to defraud the bank on a matter that has "a natural tendency to influence or is capable of influencing [the] financial institution to part with money or property," J.A. 18 (defining "material matter"). In other words, the scheme must be one "to deceive, cheat, or deprive a financial institution of something of value" by employing deception on a material matter that would naturally lead the bank "to part with money or property." J.A. 17-18. Those instructions embody the meaning of a "scheme to defraud" in this context.

Petitioner contends (Br. 22-23) that the jury instructions erroneously permitted the jury to convict him "without finding any intent to deprive th[e] bank * * * of property" because, petitioner argues, the instructions used the disjunctive "or" when defining a "scheme to defraud" as one to "deceive, cheat, *or*

deprive a financial institution of something of value," J.A. 18 (emphasis added). Petitioner misreads the instructions. The relevant instructional phrase uses a "financial institution" as the direct object of all three verbs—deceive, cheat, and deprive. The prepositional phrase that immediately follows ("of something of value") thus necessarily applies to each verb as well. The instruction thus conveyed that the scheme must be one to "deceive" the bank out of "something of value," "cheat" the bank out of "something of value," or "deprive" the bank of "something of value." Each alternative requires a finding that the scheme be designed (intended) to take property (something of value) from the bank. And by further requiring that the scheme be one to defraud a bank as to a "material matter" that would naturally lead the bank "to part with money or property," J.A. 17-18, the instructions confirm that the jury must find that the scheme's objective was to take property from a bank. Cf. *United States* v. *Park*, 421 U.S. 658, 674 (1975) ("[J]ury instructions * * * 'must be viewed in the context of the overall charge.'") (citation omitted).

Petitioner similarly contends (Br. 15, 22-23) that the district court's instruction requiring proof of intent to "deceive or cheat," J.A. 19, should have required proof of intent to "deceive *and* cheat," J.A. 22 (emphasis added) (petitioner's proposed intent-to-defraud instruction). But "deceive" and "cheat" have long been understood to reflect alternative verbal formulations for describing fraudulent conduct. See, *e.g.*, *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) (citing definition of "deceit" as "the act or process of deceiving (as by falsification, concealment, or cheating)") (citation omitted); William C. Anderson, *A*

Dictionary of Law 474 (1893) ("Defraud" means "[t]o cheat; to deceive; to deprive of a right by an act of fraud."); 1 Alexander M. Burrill, *A Law Dictionary and Glossary* 658-659 (2d ed. 1871) (defining "fraud" as "[a]ny cunning, deception or artifice, used to circumvent, cheat or deceive another") (capitalization omitted). The leading federal jury-instruction manual employs same the disjunctive phrasing, 2A Kevin F O'Malley et al., *Federal Jury Practice and Instructions* § 47:14, at 470 (6th ed. 2009), and petitioner cites no court or commentator deeming that formulation deficient. Accordingly, as the court of appeals correctly held, the jury instructions captured the elements of bank fraud in violation of Section 1344(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2016

APPENDIX

1. 18 U.S.C. 20 provides:

Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company as (defined[1] in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

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[1] Per original.

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

2. 18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

3. 18 U.S.C. 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

4. 18 U.S.C. 1344 provides:

Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.